SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE, LOUISIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

MOTION TO DISMISS.

FRED C. BENTON,
H. PAYNE BREAZEALE,

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OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE,

Appellee.

ORIGINALLY APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

ON ORDER OF APPEAL GRANTED BY THE SUPREME COURT OF THE STATE OF LOUISIANA UNDER PARAGRAPH B, SECTION 344, TITLE 28, UNITED STATES CODE ANNOTATED, SECTION 237, JUDICIAL CODE.

To the Honorable the Supreme Court of the United States:

Now into this Honorable Court, through undersigned counsel, comes the City of Baton Rouge, appellee herein, appearing only for the purpose of filing this motion, and moves this Honorable Court that the appeal granted herein by the Supreme Court of Louisiana be dismissed for lack of jurisdiction on the part of this Honorable Court to entertain this appeal, for this, to wit:

1.

That in the jurisdictional statement made by the appellant, Powers Higginbotham, in conformity with Rule 12 of

this Honorable Court, filed in connection with the petition upon which the motion for appeal was granted by the State Supreme Court of Louisiana herein, it is stated as the crux of the alleged jurisdictional fact, as follows, to wit:

> "That appellant in his petition filed in the Trial Court in his suit against the City of Baton Rouge to recover the sum of $7,957.76 under said contract of employment and by brief and argument in the Trial Court and in the Supreme Court of the State of Louisiana, alleged, urged and contended that the provisions of said Act 1 of the First Extraordinary Session of the Legislature of Louisiana for the year 1935 and the formal action taken by the Commission Council of the City of Baton Rouge of date March 22, of the year 1935, terminating appellant's contract of employment and discharging appellant without cause, constituted an impairment and a violation of his contract rights under the provisions of Section 15, Article 4 of the Constitution of the State of Louisiana and of Section 10 of Article 1 of the Constitution of the United States.
>
> "That the Supreme Court of the State of Louisiana rendered final judgment in the case, affirming the judgment of the Lower Court sustaining an exception of no cause or right of action and dismissing plaintiff's and appellant's suit. That the decision of the Supreme Court of Louisiana in the case was based on the holding that the termination without cause of appellant's contract of employment by the Commission Council of the City of Baton Rouge, as authorized by said Act of the Legislature of the State of Louisiana, was a legitimate exercise of police power, therefore, appellant's contract rights were not protected by the said provisions of the Constitution of the United States and of the Constitution of the State of Louisiana; further, that appellant's status under said contract of employment was that of a public officer of the City of Baton Rouge, or an employee performing a public function, and that the Legislature and the Commission Council of the City of Baton

Rouge had the authority to terminate said contract at will and without cause.

"That the Supreme Court of Louisiana is the highest Court of the State of Louisiana in which a decision of the case could be had where is drawn in question the validity of a statute of the State and an ordinance and the action of a municipal corporation on the ground that such act, ordinance and action being repugnant to the Constitution of the United States, and that the Supreme Court of the United States is vested with jurisdiction to review such judgment under the provision of Paragraph (b), Section 344, Title 28, United States Code Annotated, Section 237 Judicial Code; Nashville, Chattanooga and St. Louis Railway Co. *v.* White, U. S. 456, 73 L. Ed. p. 452; Great Northern Railway Company *v.* Minnesota, U. S. 503, 73 L. Ed. 477; Hall *v.* State of Wisconsin, 26 L. Ed. p. 302."

2.

Now appellee shows as a basis for the present motion that in fact there was both a Federal and a State or local question involved in the decision of the case, and that the Supreme Court of the State of Louisiana actually decided the case favorably to the appellee on both grounds, and that the State or local question involved in the case was sufficient to sustain the judgment and decree of the said State Supreme Court, and that therefore the Federal question is only collaterally involved, and is not necessarily a basis for said judgment and decree.

3.

In support of the last statement appellee shows that after the Supreme Court of the State of Louisiana had sustained the constitutionality of the said Act No. 1 of the First Extraordinary Session of the Legislature of Louisiana for the year 1935, and the action by the Commission Council of the City of Baton Rouge of date March 22nd, of the year

1935, complained about, the Supreme Court of the State of Louisiana in its written opinion rendered herein made these further observations, to wit:

"Conceding, however, for the sake of argument, that the amendment of Section 4 of Act No. 13 of the Third Extraordinary Session of 1934, by Act No. 1 of the First Extraordinary Session of 1935, did not of itself put an end to the employment of Mr. Higginbotham as Superintendent of Public Parks and Streets, the Act No. 1 of the First Extraordinary Session of 1935 certainly had the effect of permitting the Commission Council of the City of Baton Rouge to put an end to the employment. By the provisions of Section 20 of Act 207 of 1912, all of the powers and authority that were conferred by the original charter of any city that afterwards adopted the commission form of government were reserved to the city, to be exercised by the mayor and council selected under the provisions of the act of 1912. In Section 7 of the charter of the City of Baton Rouge (Act No. 169 of 1898) it is provided that the 'employees' of the city are removable as thereinafter specified. In Section 52 of the act, as amended by Act No. 249 of 1914, it is declared: 'All officers elected by the Council shall be removable by the Council at pleasure.' In Section 8 of Act 207 of 1912, it is declared that any official or assistant elected or appointed by the Commission Council may be removed from office at any time by a vote of the majority of the members of the Council, except as herein otherwise provided. There is no exception, elsewhere in the statute, that might be applicable to this case. This general rule, that a municipal council may remove at any time any official appointed or elected by the council, or anyone employed by the council to perform governmental functions, was recognized in the case of Kirkpatrick *v.* City of Monroe, 157 La. 645, 102 So. 822.

"In State *ex rel.* Loeb, Mayor of Opelousas *v.* Jordan, 149 La. 313, 89 So. 15, the defendant, Jordan, who was employed for a fixed term, by the municipal council, as superintendent of the electric light and water works

plant, at a stated salary, was discharged before the expiration of his term of employment, for cause, but without being given a hearing, such as he was entitled to under an ordinance of the city. He refused to surrender his position, and the mayor brought injunction proceedings against him. The judge of the district court gave judgment against Jordan, on the pleadings, declaring him discharged from his employment, and enjoining him from interfering with the management or superintendence of the electric light and waterworks plant. On appeal the judgment was reversed. We observed, in rendering our opinion in the case, that the theory on which the judge of the district court decided the case as he did, on the pleadings, was that Jordan's only recourse was to sue the city, under the provisions of article 2749 of the Civil Code, for the unpaid balance of the salary that he would have earned if he had been allowed to continue in his employment to the end of the term for which he was employed. But we held that Jordan's position or employment, as superintendent of the electric light and waterworks plant, was of the character of a municipal office, and hence we held that article 2749 of the Civil Code was not applicable to such an employee."

4.

As a matter of fact it was contended by the appellee in the District Court and in the State Supreme Court of Louisiana that under the provisions of Sections 7 and 52 of Act No. 169 of 1898, as amended by Act No. 249 of 1914, and Section 8 of Act No. 207 of 1912, that the authority was fully reserved to the City of Baton Rouge to discharge any of its employees by a vote of the majority of the members of the City Council at any time and without cause, and that therefore, even though the said Act No. 1 of the First Extraordinary Session of 1935 were unconstitutional and illegal, as appellant contended, nevertheless under these prior laws the ac-

tion of the City Council was fully warranted and was in every respect legal and proper.

5.

It is to be noted that the legality and constitutionality of these prior laws were not drawn in question, and that appellee's contention in this respect involved an interpretation of these State laws where there was no constitutional question presented; and the foregoing excerpt from the decision rendered by the Supreme Court of the State of Louisiana shows that said State laws were interpreted by the said Court in accordance with appellee's contention, and that, therefore, it is clear the correctness of the decision and decree rendered by the State Supreme Court can be fully substantiated upon this basis alone, and without the necessity of determining whether or not the decision of the Federal question was properly decided.

6.

In *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rpr. 131, it was decided by this Court that when there is both a Federal and State question in the case, and the latter is sufficient to sustain the judgment, this Court will not review the judgment, and the logical course is to dismiss the writ of appeal or writ of error, as the case may be. This principle has been so often recognized and applied by this Court as to hardly make necessary any lengthy citation of authority. *Eustis* v. *Bolles, supra; John A. Adams* v. *James Russell*, 33 Sup. Ct. Rpr. 846; *Cuyahoga River Power Company* v. *Northern Realty Company*, 37 Sup. Ct. Rpr. 643, 44 U. S. 300, 61 L. Ed. 1153; and *Whitney* v. *People of State of California*, 47 Sup. Ct. Rpr. 641, 274 U. S. 351, 71 L. Ed. 1095.

7.

Another principle of law well grounded in the jurisprudence of this Court is that an interpretation of State law by the highest tribunal of the State will be accepted by this Court as binding.

8.

Appellee shows that the present motion and typewritten statement embodied herein against the jurisdiction of this Court has been duly served upon the appellant, as is required by paragraph 3 of Rule 12 of this Honorable Court, and that the rules of this Court have been otherwise complied with.

WHEREFORE appellee prays that the present appeal be dismissed by this Court for lack of jurisdiction to entertain the same, and for all costs and for general and equitable relief in the premises.

(Signed) FRED G. BENTON,
City Attorney;

(Signed) H. PAYNE BREAZEALE,
Attorneys for Defendant and Appellee.

Certificate.

This is to certify that the present motion is filed in good faith and not merely for purposes of delay.

Baton Rouge, Louisiana, October 20th, 1938.

(Signed) FRED G. BENTON,
City Attorney for Appellee
City of Baton Rouge.